

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

77-6179
2/8/78

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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EARL P. HOPPER, JR., etc., et al.,

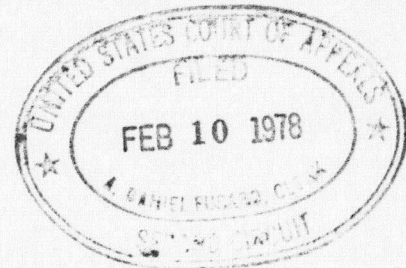
Plaintiffs-Appellants,

-against-

JAMES E. CARTER, JR., etc., et al.,

Defendants-Appellees.
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BRIEF OF REPRESENTATIVE
BENJAMIN A. GILMAN
AS AMICUS CURIAE

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Preliminary Statement

I am submitting this brief as a friend of this Court because I have learned that materials including a supposed "Final Report" of a Congressional Committee, on which I served, have been offered to the Court.

Facts

The defendants-appellees have claimed that they

have provided the Court with two "full sets" of the "hearings" and "Final Report" of the United States House of Representatives Select Committee on Missing Persons in Southeast Asia ("Montgomery Committee"). It should be brought to the attention of the Court that the documents so provided are not complete but are missing material that goes to their weight and credibility. Also, the Report, even if complete, is of dubious validity and that its defects should be pointed out.

Missing from the copies of the "Final Report" provided to the Court is an addendum written by Representative Ottinger, a member of the Select Committee. This addendum states that Rep. Ottinger wishes to associate himself with the additional remarks of Rep. Moakley. Since the "Final Report" has been cited as concluding that no Americans are alive in Indochina, it is of some import that the proponents of that view omitted from the Court's copies the concurrence of Rep. Ottinger with Rep. Moakley's caution that the Committee "found no evidence to support either the contention that all the missing are dead nor that they are alive". (emphasis added).

Missing also from the Court's copies is any indication that Rep. Lloyd was also a dissenter. The views of Rep. Lloyd were made known to the Committee and, further, were known to the Defendants-Appellees at the time of the trial in this case.

Both these defects in the copies of the "Final Report" being bandied about by the Defendants-Appellees, were shown at the trial (A-475, 477, 822, 824).

The significance of the missing material can be appreciated when the status of the "Final Report" as a committee report is evaluated. Of the ten members of the Committee, no more than five supported the "Final Report". Including the two representatives whose views were not submitted to the Court, five members dissented in critical and pertinent part from the views of the others as expressed in the so-called "Final Report". Under the Rules of the House of Representatives, a majority of those voting is necessary to adopt a report. An examination of the alleged "full set" of Committee materials furnished to this Court (see transmittal letter of Elaine C. Buck dated January 30, 1978) shows no record of any vote having been taken. That half the Committee dissented is clear. The

"Final Report" is then but a statement of one side of an unresolved dispute among the evenly divided members of the Committee. As such, it is not definitive nor even persuasive as to the contentions for which it was proffered to this Court.

Law

The procedure by which a committee may adopt a report is set forth in Jefferson's Manual of Parliamentary Practice, Section 407, which is reprinted in House Document 94-663 as part of the Rules of the House of Representatives. That section specifies that for a committee to adopt a report, the committee must act together. A paper signed by a majority acting separately is not a report of the committee. See Section 407; see also Rule XI, Cl. 2(1)(2)(A), which requires that a majority be present before a recommendation can be reported by a committee. The committee adopted a similar requirement of a majority for a quorum. Committee Rule 2.5 (A-815). The rules (Section 407) go on to provide that in a situation where the committee is equally divided, the committee may report that fact to the House and transmit the evidence,

the members views and their opposing contentions. But where there is no record of a vote being taken, the committee may not transmit a "report". (Section 407).

Conclusion

Neither the hearings nor the "Final Report" of the Montgomery Committee have any bearing on this case.

Dated: Middletown, New York
February 6, 1978

Respectfully submitted,

Benjamin A. Gilman
Amicus Curiae

